



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Nyongesa (Criminal Case 26 of 2020)  
[2022] KEHC 11713 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11713 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 26 OF 2020**

**SN RIECHI, J**

**JUNE 21, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EMMANUEL NYONGESA ..... ACCUSED**

**JUDGMENT**

1. The accused Emmanuel Nyongesa is charged with offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence are that Emmanuel Nyongesa on the 18<sup>th</sup> day of June 2020 in Mbakalo location of Bungoma North Sub county within Bungoma County murdered PW.
3. The case for the prosecution is that the accused Emmanuel Nyongesa was the husband of PW5 Florence Naliaka. They had been married for about one year and had one child. During the marriage she learnt accused had a child the deceased out of wedlock. The child, PW was brought to stay with them. Deceased stayed with them for about one month. On 18.9.2020 at 4 a.m. accused left with the deceased saying he was taking him to his aunt at Lukusi. He then came back at 6 a.m. without the child and informed her he had left him with the aunt. After 3 days she received information from the police that the child had been found in a river. She was shown the photographs which identified the child.
4. PW1 Protus Wamalwa Sisungu a neighbour of the accused was in his house on 17.6.2020 at 8 p.m. when accused came to watch T.V. Accused then asked him if he knew a short cut route to Lukusi. The witness explained to accused the route. The next day he received information that there was a child at the river. He went to the village elder who gave the description which fitted that of accused's son. He called accused and took him to the chief.
5. PW3 Martin Wasike Opicho the chief of Milima location received a telephone call from a village elder Agnes Wasike that a child had been found in a river and the body had been taken by police to Kiminini



- mortuary. On 20.6.2020 at 6 a.m. he went and arrested the accused who was a suspect and took him to Naitiri police station.
6. PW7 NO. 232598 C.I Francis Mweo recorded a confession from the accused on 20.6.2020 at Mbakalu police station. He was brought in for the purpose of recording a statement. He explained to him his rights and administered the caution. He communicated to him in English which accused was able to understand. Accused called his brother Patrick Khaemba to be present. The accused then volunteered the confession which was reduced in writing and he signed it together with his witness Khaemba. The same was produced as exhibit 2.
  7. PW2 Dr. Dennis Nanyingi performed the post-mortem on the body of the deceased. He found the deceased had no external injury but found bloody effusion on the pleural cavity, lobes on both lungs were both reddish in colour, spleen enlarged, lungs were filled with fluid. From the examination he formed opinion that cause of death was due to asphyxia due to drowning.
  8. The accused upon being put on his defence gave sworn evidence. He testified that the deceased was his son. On 17.6.2020 at 6.a.m he woke up the deceased and dressed him. He left with deceased and he was taking him to his sister at Lugusi. While crossing a river, they fell into the river and a person came and held him up from the river. He did not tell the person who rescued him about the child. He went home and stayed there until 20.6.2020 when he was arrested by nyumba kumi officials and taken to the chief who took him to Naitiri police station.
  9. The accused is charged with the offence of murder contrary to Section 203 of the Penal Code. Section 203 provides:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
  10. In a charge of murder, the prosecution is under a duty to prove beyond reasonable doubt the following elements of the offence.
    - a) The fact and cause of death.
    - b) The unlawful act or omission causing the death
    - c) That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
    - d) That the accused committed the unlawful act with malice aforethought.
  11. On fact and cause of death PW2 Dr. Dennis Nanyingi who performed the post-mortem testified that he found fluid in the respiratory system from which he formed opinion that the deceased died from asphyxia due to drowning. He issued death certificate NO. 1472684 confirming the fact of death. How did the deceased who was aged 2 years old die?
  12. PW5 Florence the wife of accused testified that accused left with the child on the morning of 18.9.2020 at 4 a.m. saying he was taking the child to his aunt. When he came back he told her that he had done so and the child was at home of the aunt. She later received information that a child's body had been retrieved from the river.
  13. The accused in his defence while admitting that he was with the deceased on the material day and time, stated that they were crossing the river when by accident they fell into the river and he was rescued but



did not try to rescue the child. However, in his confession before C.I Francis Mweo where he explained what happened he stated:

“I dressed and told my wife that I was taking him to my sister namely Rose Naballeyo at Lukusi, Webuye Sub County. I left with my son and on the way I passed Namboko primary school, my son was crying and the dogs were barking, I continued with the journey and reached a stream near Mbakalo market, through market thoughts crossed my mind as to whether to leave the child or go back with the child to home but had told my wife and neighbours that I was taking him to my sister’s place, I went closer to the stream with my son. He started crying and within that moment I dropped my son in the stream. After that I stayed for a while in the scene for about 30 minutes seeing my son drowning in the stream, tears flowed down my cheeks. Somebody I don’t know appeared and came closer to me. He asked me what the problem was. He accompanied me back to Namboko primary school. Upon reaching I hide in sugar cane plantation. I stayed for 30 minutes deciding whether to commit suicide but another thought came that I should go back, and on arrival my wife asked me I came back early and whether I had given the child to my sister. I told her that I met my brother in law whom I handed the child. After that I went to sleep.”

14. In the confession he admits that he is the one who dropped the child into the stream where he drowned. This was deliberate and it is from the drowning that the deceased died. I therefore find that it is accused who caused the death of the deceased.
15. The other element of murder that the prosecution must prove is that in committing the unlawful act, the accused had malice aforethought. Malice aforethought is defined in Section 206 Penal Code as:
16. Section 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –
  - a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - c) an intent to commit a felony;  
an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
17. In this case the accused, on his own admission dressed the child, took him along, threw him in the stream to die, left the scene and went home, he lied to wife and neighbours that he had taken deceased to his sister and stays for 3 days until when the body was recovered. These sequence of events demonstrates intention to kill, planning how to kill, implementing the plan to kill by drowning him and hiding what he had done from wife and neighbours. This was the clearest intention to kill the deceased and I find that accused had the requisite mens rea to commit murder.
18. I am satisfied that the prosecution has proved a charge of murder against the accused Emmanuel Nyongesa beyond reasonable doubt. I therefore find accused Emmanuel Nyongesa guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.



**DATED AT BUNGOMA THIS 21ST DAY OF JUNE, 2022**

**S.N RIECHI**

**JUDGE**

